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In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES H. TREAT, UNITED STATES collector of internal revenue, plaintiff in error,
v.
STEPHEN V. WHITE.
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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES M. BECK,
Assistant Attorney-General.

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STATEMENT AND ARGUMENT.

This is a certificate for instructions from the circuit court of appeals for the second circuit in an action originally brought in the New York supreme court by Stephen V. White against Charles H. Treat, collector of internal revenue, and removed by the said collector to the circuit court of the United States for the southern district of New York. The action was brought to recover the sum of $604, which the plaintiff claimed had been unlawfully exacted by the said collector. Judgment was entered in favor of the plaintiff in the circuit court and was appealed to the circuit court

of appeals, which certified the case to this court for instructions.

According to the agreed state of facts, the plaintiff was a stock broker on the New York Stock Exchange and in the course of business executed various agreements, which, in substance, were as follows:

> NEW YORK, *May 18th, 1899.*
>
> For value received the bearer may call on me on one day's notice, except last day, when notice is not required, one hundred shares of the common stock of the American Sugar Refining Company, at one hundred and seventy-five per cent any time in fifteen days from date. All dividends, for which transfer books close during said time, go with the stock.
>
> Expires June 2, 1899, 3 p. m.
>
> S. V. WHITE.

These agreements cover the sale of 30,200 shares of stock, and the collector demanded of the plaintiff that he attach to said agreements 30,200 internal-revenue stamps of the denomination of 2 cents each. This was done under protest, and the present suit is to recover the amount of said duties.

The question is, therefore, one of statutory construction. The duties were exacted under Schedule A of the war revenue act, which provides for stamp taxes, and which, *inter alia*, provides as follows:

> "On all sales, or *agreements to sell*, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company, or corporation, whether made upon or

shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, *whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money or for the future transfer of any stock*, on each hundred dollars of face value or fraction thereof, two cents: *Provided*, That in case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; *and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed:* and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers."

The agreement in question is what is commonly known as a "call," and is a familiar method whereby millions of shares of stock are bought and sold in the New York and other stock exchanges. "Puts" and "calls" ("puts" being agreements to buy as distinguished from the present agreement, technically known as a "call," which is an agreement to sell) have been used for many years in transactions aggregating many millions of dollars for the buying and selling of stocks,

and when Congress enacted the war revenue act it is to be presumed that they knew of this method of dealing in stocks.

Was it included within the provisions above quoted? In determining this it should be remembered that the act of Congress was, as its title imports, "to provide ways and means to meet war expenditures," and, as at the time of its enactment it could not be determined whether the war which had then commenced would be long or short, it is to be presumed that in making purchases and sales of stock a source of revenue, Congress did not intend to ignore or exclude one of the most common methods whereby such purchases and sales are made. No reason can be suggested why such agreements to sell were to be exempted from the burdens of taxation when absolute transfers of stocks were subjected to such taxation. Had the question now suggested been raised in Congress at the time of the passage of the act, there can be little question as to the purpose of Congress.

Is such intention reasonably within the language of the act itself?

In construing the act, no intention must be imputed to Congress to make refined and subtle distinctions as to what is or is not an agreement to sell. Congress was not indulging in the refined distinctions of the civil law, which divided sales into consensual (those requiring consent), synallagmatic (those containing reciprocal engagements), and commutative (those requiring the interchange of supposed equivalents). If they were

making any distinctions, it was that suggested by the robust common sense of the common law, which divided sales into those by which title immediately passed, and those which were executory in nature, by which the title was to pass *in futuro*. This distinction they indicated by distinguishing in the war-revenue act between "sales" and "agreements to sell." The war-revenue act was intended not alone for judges and lawyers, but for the masses of the people, upon whose shoulders the burdens of taxation were laid, and who were obliged to understand its provisions, and the language that was used was, so far as practicable, words of common speech, and they must therefore be given the common and ordinary interpretation which they would generally receive. Whether these agreements were "sales" may be a debatable question, for it can be argued with some plausibility that Congress by the word "sales" meant an absolute and unconditional sale, in which the title immediately passed from the seller to the buyer. If the agreement in question be not technically or even popularly a sale, it is nevertheless an agreement to sell. The act provides for a tax on agreements to sell, or memoranda of sales, "whether made upon or shown by the books of the association, company, or corporation, or by any assignment in blank, *or by any delivery*, or by any paper or agreement or memorandum or other evidence of transfer or sale whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money *or for the future transfer of any stock*." The proviso of the act makes the meaning

even clearer, for it provides "that in case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; *and in cases of agreement to sell* or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or *agreement to sell* before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers." This clearly indicates that Congress did not intend that transactions in stocks or bonds, where there was no formal transfer or assignment to convey title, should be exempted. It required in such cases of agreement to sell a memorandum thereof, and the present agreement meets in all respects the requirements of the act, for it shows "the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers."

If the agreement to sell such bonds or stock, which are assigned in blank or transferable by mere delivery, be not subject to the tax in question, the inequality necessarily results that sales of bonds and stocks requiring no formal transfer upon the books, or issuance of a new certificate, and which comprise the larger part of stock transactions, are exempted, while the exceptional cases, where the stock is formally transferred by the seller to the buyer, are taxed.

The last sentence above quoted is also significant. Omitting the intervening sentences, it would read as follows:

> Sales, or *agreements to sell*, or memoranda of sales, * * * whether made upon or shown * * * by any paper or agreement or memorandum or other evidence of transfer or sale whether entitling the holder in any manner to the benefit of such stock, * * * *or for the future transfer of any stock.*

This brings the present agreement literally within the provision. It is clearly an "agreement to sell, * * * entitling the holder to the benefit of the stock," or an "*agreement to sell* * * * *for the future transfer of any stock.*" In the present agreement Mr. White agrees to sell on demand, within a stipulated period, a specified amount of stock at a specified price, and the man with whom he makes this agreement pays him a valuable consideration for such agreement. If the seller should refuse to deliver the stock on demand, the holder has a clear action for a breach of contract. How could this be, if it were not an agreement to sell? It is true that there is no reciprocal right on the part of White to compel the holder to take the stock within fifteen days. The agreement is as to the vendor an absolute agreement to sell the stock, to be consummated on the demand of the vendee within a stipulated period. On the part of the vendee it is an optional right to demand, but because it is an option as to the vendee, it is not an option as to the vendor. *He must*

sell on demand. No right of rescission remains with him.

The question, therefore, in a nut shell, is this: Does an agreement to sell become less an agreement to sell because there is no reciprocal agreement to buy?

To the casuist, splitting legal hairs "twixt north and northwest side," it might seem that unless there was a reciprocal obligation to sell and buy there was no agreement to sell. But this is not true in the common acceptance of the term "agreement to sell."

In this connection we may allude to the opinion of Judge Lacomb in the court below. (100 Fed. Rep., 290.) It commences with an accurate analysis of what is a "sale," and proceeds to show that the words "sale," "contract of sale," and "agreement *of* sale" are synonymous terms, and that they do not exist "until someone accepts the offer by agreeing to buy." To this reasoning the Government does not dissent. Technically the instruments in question are not sales.

The learned judge properly distinguishes between an "agreement *of* sale" and an "agreement *to* sell," and he admits that literally the instrument in question is "an agreement to sell." He says:

> It is an agreement, and manifestly an "agreement to sell." It may be referred to as an "offer," or an "option," or a "call," or what not, but it is susceptible of no more exact definition than "an agreement to sell." Inasmuch, therefore, as the statute requires stamps to be affixed "on all sales, or agreements to sell," it would seem that these "calls" are within its provisions.

Having thus decided that Congress has aptly brought the instrument in question within the provisions of the act, the learned judge nullifies the act by assuming that "statutes are frequently prepared under circumstances which preclude the careful weighing of words and the nice discrimination of technical meanings which the text writer may avail of," and he proceeds to suggest that the expression "agreement *to* sell" is synonymous with "sale." After conceding that the meaning of Congress must be "ascertained from the statute itself," he departs from his own rule of construction by assuming that Congress not only did not mean what it did say, but also did mean what it did not say, and he bases this assumption upon another assumption that words in the following and independent paragraph of the bill also show that Congress has not used language with nice discrimination. I submit that the opposite conclusion is justified, for, in the next paragraph, where sales of products or merchandise are taxed, Congress uses the phrase "sale, agreement *of* sale, or agreement *to* sell." It is obvious, therefore, that Congress did discriminate between an agreement of sale and an agreement to sell; and when, therefore, in the preceding paragraph, which is now under consideration, it used the words "agreement to sell," the deduction is reasonable that the expression was used to distinguish it from an "agreement of sale." Judge Lacombe, however, assumes that all three terms in the latter paragraph are used synonymously, and therefore

concludes that in the preceding paragraph the same tautology exists. He says, as to the latter paragraph:

> This shows an acquaintance with the three terms, but does not necessarily imply that the two latter are used in contradistinction to each other. Having used two terms ("sale" and "agreement of sale") whose meaning is identical, the presence of the third term does not necessarily import an intention to use it with a different meaning. Undoubtedly it may be used, and is often used, in common, everyday speech, with sufficient looseness to cover an agreement of sale where delivery and payment are both postponed.

To this I reply that while the use of three different terms may not "necessarily imply that the two latter are used in contradistinction to each other," yet the fair presumption is that each term was used to convey its peculiar and appropriate meaning, whereas the learned judge is apparently of opinion that they are presumably used synonymously, even though they are not synonymous expressions. Having conceded that the use of these expressions showed "an acquaintance with the three terms" on the part of Congress, and having conceded that an agreement to sell can only be regarded as a sale in the "looseness" of "common, everyday speech," he concludes that Congress, notwithstanding its knowledge of the distinctions between the expressions, yet used the expressions without regard to such distinctions, and with no other apparent purpose than to multiply words without adding to the

meaning. I submit that such a conclusion is unwarranted.

Judge Lacombe further argues that "an agreement to sell" would not secure "a future transfer of the stock," and therefore an "agreement to sell" must mean an "agreement of sale." He says that the agreement under consideration "might secure a future offer, which would itself secure nothing until by an acceptance *an entirely new contract* was created." I submit that no "entirely new contract" is necessary under the agreement in dispute. The holder demands his hundred shares of stock and tenders payment. The stock, assigned in blank, is handed to him. The transaction is complete. No new contract, written or oral, is made. That which is done is simply the execution of the prior contract.

In further support of his opinion, the learned judge finally suggests that "if Congress has used the term 'agreement to sell' in its strict legal sense, and has thereon imposed a tax calculated at 2 cents per hundred dollars face value of the stock referred to therein, there is a double tax on a single transfer of stock. When the holder of the agreement to sell requires the other party to offer the stock in conformity to its terms and then accepts the offer, there is a meeting of their minds constituting an agreement *of* sale, or a sale—a contract independent of and different from the agreement *to* sell—and which by the express terms of the act is itself subject to stamp tax." The answer to this is that the Treasury Department ruled (Treas. Dec. 20093) that

when an agreement to sell was completed by a transfer of the stock, no further tax would become due when the tax had already been paid upon the agreement to sell. The Government has not sought to impose double taxation. It assumes that an agreement to sell, which is consummated by an actual transfer, is liable to but one tax, but it does contend that an agreement to sell is subject to the tax, even though the delivery is to take place in the future and is conditional as to the vendee, and even though there be no actual delivery at all.

The learned judge also suggests as a final reason for his decision that, as the question is "extremely doubtful," the duty should not be imposed. I submit that the doubt is fanciful and requires for its support the elimination of the expression "agreement to sell" by arbitrary construction. The circuit judge having held that this agreement was aptly defined as an "agreement to sell," and the act having specifically imposed a tax upon an "agreement to sell" as distinguished from a "sale," the judgment should have been in favor of the defendant, and the circuit court of appeals should be so instructed.

Respectfully submitted.

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